No. 10-562

In the
Supreme Court of the United States

ALYSON J. KIRLEIS,

Petitioner,

v.

DICKIE, McCAMEY & CHILCOTE, P.C.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the district court and the Third Circuit Court of Appeals applied well-settled law in granting and affirming summary judgment in favor of Respondent, a professional corporation and law firm, because, as a class A shareholder/director, Petitioner is a statutory employer by virtue of her numerous attributes of ownership under the test articulated by this Court in *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440 (2003), and, therefore, is precluded from bringing claims under the various anti-discrimination laws.

STATEMENT PURSUANT TO RULE 29.6

Dickie, McCamey & Chilcote, P.C. is owned by its shareholder/directors. As such, there is no parent or publicly held company owning 10 percent or more of the stock of Dickie, McCamey & Chilcote, P.C.

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COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case contains not only multiple inaccuracies and immaterial allegations but, more importantly, omits critical undisputed facts. The following counter-statement of the case accurately reflects the relevant portions of the undisputed factual record, as well as the decisions of the lower courts:

I. The Parties

Respondent is a Pittsburgh-based law firm and professional corporation. (App. 640a [para. 12].)[1] Petitioner is an attorney and has been licensed to practice law in the Commonwealth of Pennsylvania for over twenty years. (App. 242a.) Petitioner has practiced law at Respondent for her entire professional career, for ten years as an associate attorney, for three years as a class B shareholder, and for the past eight years as a class A shareholder/director, the only level of firm ownership. (App. 241a-242a.)

II. Respondent's Organization And Functioning

The relationship among Respondent's shareholder/directors and the relationship between Respondent's shareholder/directors and the corporate entity is governed by the by-laws of the corporation. (App. 216a-230a, 638a [para. 2], 647a-683a.) Pursuant to section 2.02 of the by-laws, all class A shareholder/directors, including Petitioner, are eligible

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[1] All citations to App. __ are references to the Appendix filed in the United States Court of Appeals for the Third Circuit.

to and do serve on Respondent's board of directors. (App. 159a, 217a-218a.) No associate attorney, class B shareholder, or other employee of Respondent may serve on the board. (App. 639a [para. 8].) As a voting member of Respondent's board of directors since January 1, 2001, Petitioner and her fellow shareholder/directors have voted on or have had the opportunity to participate in deciding a myriad of significant management issues. (App. 241a, 280a, 284a, 396a-401a, 467a-563a, 685a-801a, 812a-854a, 901a-902a, 912a-914a, 916a-940a.)

Respondent's by-laws specifically reserve certain decisions to the board, and pursuant to section 4.03(e) of the by-laws, the board has delegated certain decisions to Respondent's executive committee. (App. 216a-230a, 223a). Additionally, under section 4.03(a) of the by-laws, Petitioner, like all other shareholder/directors, is eligible if nominated and elected by her fellow shareholder/directors to serve as: (a) president and chief executive officer; (b) managing director and chief operating officer; (c) secretary/treasurer and chief financial officer; (d) member of the executive committee; (e) chairperson of any of Respondent's committees; (f) member of the peer review committee, which reviews all other shareholder/directors, including the president; and (g) Respondent's general counsel. (App. 222a.)

III. Becoming A Shareholder/Director Of Respondent

Respondent does not "hire" class A shareholder/directors. Rather, shareholder/directors are elected by an affirmative three-fourths vote of all class A shareholder/directors. (App. 216a-230a.)

Petitioner herself was elected as a class A shareholder/director of Respondent, effective January 1, 2001, in accordance with an election held pursuant to section 3.08 of the by-laws. (App. 221a-222a, 641a [para. 20].) Following her election, Petitioner has actively participated in the election of new class A shareholders/directors.

Similarly, Respondent's shareholder/directors, including Petitioner, cannot be fired by Respondent. Rather, a shareholder/director's relationship with his or her fellow shareholder/directors can only be terminated according to section 2.09 of the by-laws by an affirmative vote of three-fourths of the other class A shareholder/directors and only "for cause." (App. 219a, 641a [para. 21].)

IV. Shareholder/Directors' Control, Independence, And Influence Over Their Work And Respondent's Managerial Decisions

Respondent's shareholder/directors, including Petitioner, are not subject to Respondent's rules and regulations. Rather, by virtue of their status as class A shareholder/directors and voting members of the board of directors, Petitioner and her fellow shareholder/directors have the ability to establish the rules and regulations governing the firm.

Further, Respondent's shareholder/directors, including Petitioner, handle their cases as they see fit. (App. 162a-167a, 191a-205a, 259a-274a, 289a-290a, 302a-316a, 359a-361a, 412a-428a, 438a-446a, 660a-672a, 891a-899a, 941a-1006a.) By way of example, Petitioner admitted that, based upon her own

professional judgment, consistent with the interests and input of clients, she formulates the trial strategy on her cases – this is especially true for the work Petitioner has done for her own clients, wherein she consults with and reports to no one. (App. 161a, 293a-301a, 362a-367a, 428a-433a, 451a-453a, 900a.) Moreover, as a class A shareholder/director, Petitioner supervises other attorneys, including associates and other shareholders, as well as Respondent's support staff, on a regular basis. (App. 262a-266a, 372a-387a, 1007a-1049a, 2792a.)

Respondent's class A shareholder/directors enjoy complete discretion to expend Respondent's money for client entertainment expenses for all existing firm clients and for other business purposes. (App. 368a-371a, 627a-636a, 642a [para. 26].) By way of example, as a class A shareholder/director, Petitioner can and has approved her own firm expense reimbursement requests. (App. 627a-636a, 642a [para. 26].) Associate attorneys and other employees, on the other hand, must obtain prior approval from a shareholder/director to spend Respondent's money. (App. 642a [para. 27].) Petitioner also has the authority to reasonably approve the expenditure of Respondent's funds by associate attorneys and other employees. (App. 642a [para. 28].)

While it is true that Respondent's executive committee sets shareholder compensation and that the confidentiality of the same is maintained, this fact does not beget the conclusion that Petitioner or any of her fellow shareholder/directors "reported to" the executive committee. To the contrary, pursuant to section 4.03(e) of the by-laws, the board of directors specifically has delegated certain decisions to the executive committee, including "the determination of

compensation to be paid to all Shareholders, Officers, Directors, and employees of the Firm." (App. 223a.) Pursuant to section 4.03(f) of the by-laws, records relating to compensation paid, or to be paid, to officers, directors, or shareholders must remain confidential "unless disclosure of all or any part thereof shall be required by a majority vote of the Class A Shareholders." (App. 223a.) Thus, pursuant to section 4.03(f) of the by-laws, the board of directors has the right and the ability to amend the by-laws of the firm to permit and/or require disclosure of the allocated percentage share distribution and projected compensation for each individual shareholder/director. (App. 223a.) Notably, during the relevant time period, no class A shareholder/director, including Petitioner, has ever requested disclosure of the allocated percentage share distribution/compensation for other class A shareholder/directors. (App. 170a.) Further, pursuant to section 1.03(b) of the by-laws, Petitioner, like all other class A shareholder/directors, can vote on amendment and repeal of the by-laws. (App. 216a-217a.)

Finally, as class A shareholder/directors and voting members of the board of directors, Petitioner and her peers have a meaningful opportunity to exert substantial influence over Respondent's managerial decisions. Indeed, throughout her relationship with Respondent, Petitioner has had ample opportunity to share, and has shared, in the management and control of her corporation. The record is replete with examples of these opportunities. She has imposed her will on Respondent through management service on various committees and through shareholder votes, in which she has not hesitated to take positions adverse to the executive committee and her other fellow class

A shareholder/directors. (App. 91a-111a [para. 42], 123a-125a [paras. 87-92], 130a-131a [paras. 114-115].)

V. Intent Of The Parties

Respondent's by-laws reflect the intent that shareholder/directors are owners of the professional corporation and as such are employers, not employees, of the firm. The by-laws govern equity interests in Respondent, the rights and duties to participate in management, exposure to liability, participation in profits and losses, capital investment in the firm, voting rights, calculations of distributions and the security inherent in the fact that a shareholder/director can only be expelled by a three-fourths vote of his or her fellow class A shareholder/directors. (App. 216a-230a, 641a [para. 21].) Also, pursuant to section 3.08(g) of the by-laws, Petitioner, like all other class A shareholder/directors, receives a package of financial benefits that associate attorneys and other employees do not receive. (App. 159a-160a, 639a [paras. 3-4].) Since becoming a class A shareholder/director, Petitioner has availed herself of these rights and benefits. (App. 279a, 434a-437a, 639a [paras. 5-6].)

VI. Shareholder/Directors Sharing In The Profits, Losses, And Liabilities Of Respondent

Upon her election as a class A shareholder/director of Respondent, like all class A shareholder/directors, Petitioner was required pursuant to section 4.03(e) of the by-laws to make a capital contribution of $7,500 to Respondent, which she has done, and to respond to any future capital calls, even if to pay her own judgment. (App. 207a, 246a-246a.) No associate

attorney/employee or other employee makes any capital contribution to Respondent. (App. 643a [para. 31].) Petitioner's capital account is at risk. Should Respondent not have the assets to pay an obligation, a creditor could attach and take Petitioner's entire capital account, as well as the capital accounts of all other class A shareholder/directors, to satisfy an obligation owed by Respondent to the creditor. (App. 643a [para. 32].)

As a class A shareholder/director, Petitioner's compensation, like that of all other class A shareholder/directors, is determined by the net profits of Respondent each year. (App. 171a, 174-175a, 216a-230a.) Petitioner's compensation, like all other class A shareholder/directors, is set in January of each year for that calendar year by Respondent's executive committee, on which she is eligible to serve upon election or appointment. (App. 172a, 216a-230a, 402a-410a.) Petitioner's compensation, like that of all other class A shareholder/directors, is set as a percentage of Respondent's anticipated yearly profit. (App. 171a, 654a.) Petitioner, like all other class A shareholder/directors, is advised in writing what her estimated distribution in dollars will be if Respondent makes exactly 100 percent of its projected net distributable profit. (App. 172a, 402a-410a.) As a class A shareholder/director, Petitioner's actual compensation is a function of her percentage of Respondent's profits. (App. 171a, 654a.) Class A shareholder/directors divide the net profits based on their allocative percentage share as set each January. (App. 411a, 903a-905a.) As a result, Petitioner's final annual compensation may be more or less than the estimated distribution made the preceding January. (App. 411a, 903a-905a.)

When Respondent's net distributable profits exceeded estimated net distributable profits, Petitioner earned even more than was projected at the beginning of the year. (App. 326a-339a, 402a-411a.) In each year that Respondent actually realized more net profit than projected, no associate attorney or other employee received a percentage of any increased profits. (App. 644a [para. 33].)

When Respondent's net distributable profits fell short of the estimated net distributable profits, Petitioner earned less than was projected at the beginning of the year. (App. 326a-339a, 402a-411a.) In each year that Respondent actually realized less net profit than projected, no associate attorney or other employee experienced a decrease in their fixed compensation. (App. 644a [para. 34].)

Petitioner, like all other class A shareholder/directors, has seen a decline in her compensation in years that Respondent's net distributable profit has been less than was available the prior year. (App. 326a-339a, 402a-411a.)

In the proceedings below, Petitioner admitted that her compensation is linked to Respondent's net profits, rising and falling in tandem with its net distributable income, *i.e.*, profit. (App. 326a-339a, 402a-411a.) Thus, her income exceeded the January projection in years in which Respondent's profits were larger than anticipated. Similarly, when Respondent failed to achieve its projected profits, Petitioner's year-over-year income fell. This was true even if Petitioner's percentage interest in the net profits was larger in the subsequent year. (App. 326a-339a, 402a-411a.)

VII. The Proceedings Below

On November 9, 2006, Petitioner filed her first complaint against Respondent in the United States District Court for the Western District of Pennsylvania, alleging sex discrimination and retaliation in violation of the Equal Pay Act/Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, and the Pennsylvania Human Relations Act. On December 18, 2006, Petitioner filed a second complaint, making similar allegations to those set forth in her first complaint but with more factual detail. The district court consolidated the actions on January 12, 2007. (Pet. App. 10-12.)

At a case management conference held on June 11, 2009, the district court granted Respondent's motion for bifurcation of discovery and dispositive motion proceedings. The court then directed that the parties conduct such proceedings in two phases, with the initial phase being limited to issues relating solely to Petitioner's status as an employer/owner or employee. The parties then engaged in phase one discovery, which closed on July 15, 2009. (Pet. App. 17.)

On July 30, 2009, Respondent moved for summary judgment, noting that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law because Petitioner could not meet her burden to establish that she was an employee within the meaning of the applicable statutes. By opinion and order dated October 28, 2009, Judge Arthur J. Schwab granted the motion for summary judgment. Applying the test set forth by this Court in *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440 (2003), the district court correctly reached the

inescapable conclusion that as a class A shareholder/director possessing not one, but all of the attributes indicative of ownership status, Petitioner was an employer/owner who was not entitled to invoke the federal anti-discrimination laws. (Pet. App. 8-77.)

Petitioner filed an appeal with the United States Court of Appeals for the Third Circuit, arguing that the district court erred on every point of its *Clackamas* analysis. On July 15, 2010, the Third Circuit affirmed the district court's order granting summary judgment in favor of Respondent, holding the undisputed material facts of record conclusively demonstrated that Petitioner was an employer/owner of Respondent as a matter of law. (Pet. App. 1-5.) The Third Circuit denied Petitioner's subsequent requests for rehearing en banc and panel rehearing. (Pet. App. 79-80.)

REASONS FOR DENYING THE WRIT

I. The Criteria Set Forth In Supreme Court Rule 10 Are Not Satisfied

Petitioner provides absolutely no plausible factual or legal basis for her petition. The decisions below do not conflict with a decision of this Court or any court of appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not met her stringent burden of demonstrating "compelling reasons" for the petition to be granted. *See* Sup. Ct. R. 10.

This case simply is not one in which certiorari should be granted. The instant action does not meet any of the general criteria set forth in SUP. CT. R. 10. "A petition for writ of certiorari will be granted only for

compelling reasons." *Id.* Further, a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law." *Id.* The petition before the Court is based on the invalid argument that the courts below made erroneous factual findings and that there is an important principle of law at issue. There is not.

Petitioner contends that the courts below made erroneous factual findings, apparently because they did not adopt her self-serving interpretation of the facts. (Petition, pp. 11-12.) However, Petitioner's version of the facts is not supported by the evidence of record, which she conveniently fails to reference or include in her appendix. To the contrary, the undisputed material facts, as set forth by Respondent, are supported by the evidence of record, and the courts below so ruled.

More importantly, even if there were erroneous factual findings, which there were not, such is not a basis on which certiorari is granted. A writ of certiorari will not be granted to review evidence or inferences drawn from the evidence. *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 304 U.S. 175 (1938). The decision by the court of appeals is not to be disturbed unless plainly without support. *United States v. Chem. Found.*, 272 U.S. 1 (1926). Certiorari should be denied when the decision of the court of appeals is a fair assessment of the record because the Supreme Court does not grant a writ of certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220 (1925). Petitioner here seeks exactly that – certiorari for no other reason than to have this Court wade through the several-

thousand-page record in search of a triable claim that both the court of appeals and district court could not find. This does not meet the compelling reason standard for granting certiorari in SUP. CT. R. 10.

Although Petitioner argues that the courts below misapplied the standard articulated by this Court in *Clackamas*, she does not supply any legal authority to support her argument. Moreover, even if the court of appeals or the district court had misapplied the principle, which they did not, an asserted misapplication of a stated rule of law is not recognized by SUP. CT. R. 10 as a reason for granting a writ of certiorari.

Petitioner argues this case somehow presents an "important issue" and cites various online blogs and internet articles discussing her complaints and the decisions below. However, this Court does not sit to satisfy even scholarly interests in issues or for the benefit of particular litigants. *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70 (1955). In any event, if one were to accept internet visibility and online media attention as appropriate factors for determining whether this Court should grant certiorari, such matters as the family law case involving the custody of Britney Spears' children, by Petitioner's reasoning, thus would warrant consideration by this Court, as a Google search of the terms "Britney Spears custody case" yields nearly five hundred thousand search results.

This case also does not meet any of the specific criteria set forth in SUP. CT. R. 10(a-c). The court of appeals has not entered a decision in conflict with a decision of another United States court of appeals.

SUP. CT. R. 10(a). In fact, all courts of appeals which have been called upon to apply *Clackamas* to circumstances factually analogous to those presented here have, like the Third Circuit in this case, found the individual in question to be an employer/owner not covered by the anti-discrimination laws. A decision by a state court of last resort is not involved. SUP. CT. R. 10(b). Nor does this case involve the situation where the court of appeals has decided an important question of federal law that has not been, but should be, decided by this Court, or has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c). *Clackamas* controls the outcome of this case and was properly applied by the courts below. Petitioner's arguments are not compelling reasons for which a petition for certiorari should be granted. Accordingly, applying the governing considerations for granting a petition for writ of certiorari to the instant petition, it is clear that the petition should be denied.

II. The Courts Below Correctly Concluded As A Matter Of Law Based Upon Undisputed Material Facts That Petitioner Is An "Employer" Within The Meaning Of The Anti-Discrimination Laws And Thus Cannot Assert Claims Under Those Statutes

A. The Courts Below Properly Applied The Test Set Forth By This Court In *Clackamas*

The issue in this case is whether Petitioner is properly considered an "employer" who may not assert claims under the anti-discrimination laws or whether

she must be deemed an "employee" covered by those statutes. This determination is controlled by the decision of this Court in *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003). The courts below properly analyzed Petitioner's employment status within the confines of the test set forth in that case, giving careful consideration to each of the following factors:

> (1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
>
> (2) Whether and, if so, to what extent the organization supervises the individual's work;
>
> (3) Whether the individual reports to someone higher in the organization;
>
> (4) Whether and, if so, to what extent the individual is able to influence the organization;
>
> (5) Whether the parties intended that the individual be an employee, as expressed in a written agreement; and
>
> (6) Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-50.

Applying the six *Clackamas* factors to the undisputed facts of record, the district court, and the court of appeals through its affirmance, determined

that all six factors compelled the finding that Petitioner is an employer because: (1) Petitioner shares in the profits, losses and liabilities of Respondent; (2) the totality of all relevant documents and the conduct of the parties over the years reflected the intent that Petitioner be considered an owner/employer; (3) Petitioner has had the ability to exert substantial influence over Respondent through the exercise of her voting rights under the by-laws and her service on management committees; (4) Petitioner's work is not supervised; (5) Petitioner does not report to anyone; and (6) unlike an employee, Petitioner can only be terminated from the professional corporation upon a showing of cause and the affirmative vote of three-fourths of her fellow class A shareholder/directors. The district court and the Third Circuit correctly applied the *Clackamas* factors and, therefore, concluded that Petitioner is an owner/employer as a matter of law.

Unhappy with the result reached by the courts below based upon their application of the undisputed facts of record to the factors articulated by this Court in *Clackamas*, and unable to offer even one point of decisional authority wherein a shareholder of a professional corporation practicing law was deemed to be an employee of the corporation, Petitioner now erroneously contends that the lower courts somehow misapplied this Court's decision in *Clackamas*. Petitioner's argument in this regard is an obvious red herring designed to create the appearance of reversible error where none, in fact, exists. Review of the *Clackamas* decision vis-à-vis the facts of record and the lower courts' opinions in this matter easily reveals the fallacy of Petitioner's argument.

B. The Courts Below Properly Determined That The First *Clackamas* Factor Weighs Heavily In Favor Of A Finding That Petitioner Is An Employer

1. The Courts Below Properly Found That Respondent Has No Ability To Hire Or Fire Petitioner

The first factor posed by this Court in *Clackamas* to determine whether a shareholder in a professional corporation is an "employee" or an "employer" for purposes of the anti-discrimination laws is "whether the organization can hire or fire the individual." *Clackamas*, 538 U.S. at 449. With respect to hiring, the undisputed facts, as summarized above, demonstrate that Respondent does not "hire" class A shareholder/directors. Rather, class A shareholder/directors are elected by an affirmative three-fourths vote of all class A shareholders. Petitioner herself was elected as a class A shareholder/director of Respondent, effective January 1, 2001, in accordance with an election held pursuant to section 3.08 of the by-laws. Following her election, Petitioner actively participated in the election of new class A shareholders/directors.

With respect to firing, Petitioner is not an employee at will and cannot be fired by Respondent or anyone at Respondent. Rather, Petitioner's relationship with her fellow class A shareholder/directors can only be terminated according to section 2.09 of the by-laws by an affirmative vote of three-fourths of the other class A shareholder/directors and only for cause.

Applicable case law confirms that the lower courts correctly found that the first *Clackamas* factor weighs heavily in favor of a determination that Petitioner is not an "employee" of Respondent. Under similar facts, in *Cronkhite v. Unity Physician Group, P.C.*, 1:05-CV-1577, 2007 U.S. Dist. LEXIS 24884 (S.D. Ind. March 30, 2007), the district court, applying *Clackamas*, granted summary judgment in favor of a professional corporation finding that a shareholder physician was not an "employee" as a matter of law. Central to the court's analysis of the first *Clackamas* factor was the fact that Unity could not fire Dr. Cronkhite in the usual sense because under the physician employment agreement he could be terminated without cause only by a vote of 75 percent of Unity's board of directors. "This level of job security was not shared by non-shareholder physicians." *Id.* at *19.

In the instant matter, the three-fourths vote to terminate requirement set forth at section 2.09 of Respondent's by-laws is nearly identical to the 75 percent provision in *Cronkhite*, except that Petitioner can be removed by a vote of her peers only "for cause," providing her with an even higher level of job security than the physician in *Cronkhite*. This voting requirement also is comparable to the termination provision at issue in *Solon v. Kaplan, Begy & Von Ohlen,* 398 F.3d 629 (7th Cir. 2005) (another post-*Clackamas* decision, affirming summary judgment in favor of the defendant law firm because the plaintiff, a former general partner, was not an "employee" but, rather, was an "employer" as a matter of law), which required a two-thirds vote of the general partners of a law firm in order to involuntarily terminate Solon's relationship with the firm. The Seventh Circuit, in ruling that Solon was not an employee of the firm for

Title VII purposes, held that this benefit, along with others, "distinguished [Solon] from the firm's special partners and associates." *Solon*, 398 F.3d at 633; *see also Pearl v. Monarch Life Ins. Co.*, 289 F. Supp. 2d 324, 328 (E.D.N.Y. 2003) (holding that a shareholder physician was not an employee under a *Clackamas* analysis, in part because he "could be neither hired nor fired in the usual sense"). This distinguishing element is undisputedly present in this case as well and differentiates Petitioner from Respondent's associates to whom she wishes to compare herself. In light of the legal standards set forth above, to which Petitioner offers no contradictory authority, and given the undisputed facts of this case, it is clear that the lower courts rightly determined that the first *Clackamas* factor weighs heavily in favor of a determination that Petitioner is not an "employee" of Respondent.

2. The Courts Below Properly Determined That Petitioner Has Ultimate Control Over The Rules And Regulations Of Her Work

In addition to examining the organization's ability to hire or fire an individual, the first *Clackamas* factor also directs the courts to evaluate "whether the organization can set the rules and regulations of the individual's work." *Clackamas*, 538 U.S. at 449. The courts below gave thorough consideration to this factor and, because the undisputed evidence demonstrates that Petitioner retained ultimate control over the rules and regulations of her work, correctly found that it weighed in favor of a finding that Petitioner is an "employer."

Petitioner's failed arguments notwithstanding, it is clear from the record that she has not been subject to Respondent's rules and regulations. Rather, through her status as a class A shareholder/director and a voting member of the board of directors, Petitioner has had the ability to help establish the rules and regulations of Respondent's operations. Although she attempts to downplay the significance of her class A shareholder/board member status, Petitioner cannot avoid her own admissions, most of which are in direct contradiction to the arguments set forth in her submissions to this Court and all of which confirm her power and influence within Respondent. Specifically, Petitioner has made the following significant admissions:

- She serves on Respondent's board of directors, whereas no associate attorney or other employee of Respondent may serve on the board. (App. 83a [paras. 14-15], 1059a [paras. 14-15].)

- Although she argues that board participation is "meaningless," Petitioner admits that she never declined a seat on the board of directors and has never resigned from the board. (App. 83a [paras. 16-17], 1059a [paras. 16-17].)

- All shareholders' votes are counted equally. (App. 90a [para. 40], 1066a-1067a [para. 40], 1223a [para. 885].)

- She has referred to herself as the "one woman in management," has referred to her service as the co-chair of the associates committee as a "management contribution," has described

herself as having "an active role in Firm administration," and has represented that she spent 250 to 300 non-billable hours per year performing her duties as co-chair of the associates committee. (App. 125a [paras. 89-92], 1087a [paras. 89-92].)

- Associate attorneys and other employees of Respondent do not have access to the detailed financial information that is provided to shareholder/directors on a monthly basis. (App. 87a [para. 33], 1062a [para. 33].)

- Associate attorneys and other employees of Respondent do not have a vote on the topics reserved for decision by the board of directors pursuant to section 3.08 of the by-laws. (App. 90a [para. 37], 1066a [para. 37].)

- Although she may call a special meeting of the board of directors, no associate attorney or other employee of Respondent enjoys that power. (App. 115a [paras. 63-64], 1081a [paras. 63-64].)

- No associate attorney or other employee of Respondent can vote on the election or termination of shareholders, adoption, amendment or repeal of the by-laws, or dissolution of Respondent, powers provided to shareholder/directors pursuant to section 1.03(b) of the by-laws. (App. 116a [para. 68], 1081a [para. 68].)

- No associate attorney or other employee of Respondent may vote to remove an officer from office, a power conferred upon shareholder/

directors by section 3.06 of the by-laws. (App. 116a [para. 73], 1082a [para. 73].)

- No associate attorney or other employee may propose the creation of a new committee, which shareholder/directors may do pursuant to section 4.01 of the by-laws. (App. 116a [para. 75], 1082a [para. 75].)

- No associate attorney or other employee may vote on the indemnification of any shareholder/director, which shareholder/directors are free to do pursuant to section 7.02 of the by-laws. (App. 117a [para. 77], 1082a [para. 77].)

- No associate attorney or other employee participates in setting the end date of the fiscal year of Respondent, as opposed to shareholder/directors, who participate in setting the end date of the fiscal year of Respondent pursuant to section 8.03 of the by-laws. (App. 117a [para. 79], 1082a [para. 79].)

- Transactions with associate attorneys and other employees are not voidable if their status as a participant in the transaction is not disclosed, whereas transactions between Respondent and shareholder/directors are voidable as interested transactions under section 8.05 of the by-laws if their status as a party to the transaction is not disclosed. (App. 117a [para. 81], 1082a [para. 81].)

- No associate attorney or other employee of Respondent, except those employees in the business office with a need to know, have access

to the salaries paid to all associate attorneys, respondent's management staff, paralegals and all support staff. Petitioner, on the other hand, had actual knowledge of associate attorney salaries by virtue of her position as co-chair of the associates committee and, as a shareholder/director, has access to the salaries of all other employees. (App. 126a [para. 95], 1088a [para. 95].)

- Associate attorneys and other employees must obtain prior approval from a shareholder/director to spend Respondent's money. (App. 126a [para. 99], 1089a [para. 99].)

Again, relevant decisional law discussing the foregoing attributes confirms that the lower courts correctly found that the first *Clackamas* factor weighs heavily in favor of a determination that Petitioner is not an "employee" of Respondent. Under similar facts, the court in *Cronkhite v. Unity Physician Group*, *supra*, also concluded that the physician group did not set the rules and regulations of the plaintiff's work. To the contrary, "[t]hrough Dr. Cronkhite's status as a shareholder, he helped establish the rules and regulations of Unity's operations." *Id.* at *19. Similarly, as demonstrated by her own admissions, Petitioner has had the ability to help establish the rules and regulations governing the operations of Respondent law firm. Like Petitioner, Dr. Cronkhite failed to produce any affirmative evidence rebutting Unity's contention that it did not set the rules and regulations governing his work. In light of the legal standards set forth above, to which Petitioner offers no contradictory authority, and given the undisputed facts of this case, it is clear that the courts below

rightly determined that the first *Clackamas* factor weighs heavily in favor of a determination that Petitioner is not an "employee" of Respondent.

C. On The Second *Clackamas* Factor, The Courts Below Properly Concluded That Petitioner Retains A Significant Degree Of Independence

The second *Clackamas* factor requires an analysis of "whether and, if so, to what extent the organization supervises the individual's work." *Clackamas*, 538 U.S. at 450. The courts below gave thorough consideration to this factor and, because the undisputed evidence demonstrates that Petitioner retains a significant degree of independence in her work, correctly found that it weighed in favor of a finding that Petitioner is an "employer."

The undisputed facts of this case, as set forth above, confirm that Petitioner handles her cases as she deems appropriate. Based on her own professional judgment, consistent with the interests and input of clients, Petitioner formulates the trial strategy on her cases. This is especially true for the work she has done for her own clients, wherein Petitioner consults with and reports to no one. Moreover, as a class A shareholder/director, Petitioner supervises other attorneys, including associates and other shareholders, as well as Respondent's support staff, on a regular basis. Accordingly, the record clearly supports the lower courts' findings that Petitioner retains a significant degree of independence in her work and that the second *Clackamas* factor therefore weighs in favor of a determination that Petitioner is not an "employee" of Respondent.

D. The Courts Below Properly Determined That The Third *Clackamas* Factor Weighs In Favor Of A Finding That Petitioner Is An Employer

The third *Clackamas* factor asks "whether the individual reports to someone higher in the organization." *Clackamas*, 538 U.S. at 450. Here, Petitioner maintains that she reported to Respondent's executive committee by virtue of the fact that, pursuant to the powers delegated to it under the by-laws, the executive committee performs certain organizational duties. Evaluation of the undisputed facts of record, as summarized above, confirms that Petitioner's various arguments in this regard are without merit.

Moreover, applicable case law supports Respondent's position and the lower courts' reasoning. In *Cronkhite, supra*, the district court found that the third *Clackamas* factor supported the conclusion that Dr. Cronkhite was not an employee of Unity. In that case, the plaintiff argued that he reported to Dr. Slaughter, the medical director of the emergency department, because as medical director, Dr. Slaughter performed certain organizational and liaison-type duties and conducted peer reviews of Dr. Cronkhite and other shareholder physicians who worked within the department. However, the court found that "these actions do not warrant a conclusion that Dr. Slaughter was Dr. Cronkhite's 'boss' or that he was positioned more highly within the organization than Dr. Cronkhite." *Cronkhite*, 2007 U.S. Dist. LEXIS 24884, at *26.

Relying on the fact that Dr. Slaughter conducted peer reviews of several Unity board members who worked in the department, the court reasoned that "it does not follow (and no evidence has been adduced to suggest) that Unity's board members all reported to Dr. Slaughter." *Id.* Similarly, in the present case, it does not follow, and no evidence has been adduced to suggest, that all of Respondent's shareholder/directors "report to" the executive committee.

To the contrary, review of Respondent's by-laws as well as the conduct of the parties reveals that it is the executive committee who reports to the shareholder/directors of the firm, including Petitioner. All of the authority held by the committee has been specifically delegated to it by the board of directors, and what the board can give, the board can take away. In other words, the executive committee, on which Petitioner could serve if elected by her peers or appointed, serves at the pleasure of the board. In light of the legal standards set forth above, to which Petitioner offers no contradictory authority, and given the undisputed facts of this case, it is clear that the courts below properly determined that the third *Clackamas* factor weighs in favor of a determination that Petitioner is not an "employee" of Respondent.

E. On The Fourth *Clackamas* Factor, The Courts Below Properly Found That Petitioner Has A Meaningful Opportunity To Exert Substantial Influence Over Decisions At Respondent

The fourth factor posed by this Court in *Clackamas* to determine whether a shareholder in a professional

corporation is an "employee" or an "employer" for purposes of the anti-discrimination laws is "whether and, if so, to what extent the individual is able to influence the organization." *Clackamas*, 538 U.S. at 450. The courts below correctly determined that as a class A shareholder/director and a voting member of the board of directors, Petitioner has a meaningful opportunity to exert substantial influence over decisions at Respondent. Relying on nothing more than suspicion and conjecture, Petitioner argues that corporate participation at Respondent is illusory and her status as a board member is meaningless.

However, the undisputed facts of record plainly show that Petitioner has had the ability, by virtue of her status as a voting member of the firm's board of directors for nearly a decade, to exert significant influence over the firm's management. Even in light of Petitioner's claims that such participation was "meaningless" and "illusory," pertinent case law confirms that the district court correctly found that the fourth *Clackamas* factor weighs in favor of a determination that Petitioner is an "employer" and not an "employee" of Respondent. As the Eighth Circuit explained in *Devine v. Stone, Leyton & Gershman*, 100 F.3d 78 (8th Cir. 1996) (affirming summary judgment in favor of defendant law firm because law firm was not an "employer" under Title VII), "a factor important to consider in evaluating the degree of management and control is the ability to participate in setting firm policy. Participation rights need not be equal, but the test is whether the shareholder-directors have a meaningful voice in decision-making." *Id.* at 81 (emphasis added).

The Seventh Circuit's opinion in *Schmidt v. Ottawa Med. Ctr., P.C.*, 322 F.3d 461 (7th Cir. 2003) (affirming summary judgment in favor defendant medical center because Schmidt could not establish that he was an "employee" under the ADEA) also highlights the significance of an individual's right to have a say in the decisions of the business. As in *Clackamas*, the issue in *Schmidt* was whether the plaintiff, a physician and shareholder-director in a professional corporation that operated the medical center where he worked, should be treated as an employer for purposes of the ADEA. Schmidt sought to challenge the medical center's shareholder compensation plan pursuant to the ADEA, and whether he was properly classified as an "employer" or "employee" determined whether he was entitled to bring suit. What persuaded the Seventh Circuit that Schmidt should be classified as an employer regardless of which methodology was used was his right, as both a shareholder and director, to participate in the governance of the corporation:

> As a shareholder, he possesses an equal vote in all matters put to shareholder vote, including the hiring of non-shareholder physicians and shareholder compensation. Presumably as a director, he has in the past and now also enjoys a voice in all matters put before the board. Throughout his relationship with OMC and continuing to the present day, Dr. Schmidt has thus had ample opportunity to share in the management and control of OMC. *** . . . the mere fact that lately his preferences on shareholder compensation proposals have not secured the majority opinion of his fellow shareholders does not alter the fact that with each vote he has exercised this right to control.

> Even though Dr. Schmidt rejected the current plan because he would be adversely affected by its passage, he nevertheless had the opportunity to participate in revising and voting on it.

Id. at 467.

The Seventh Circuit's decision in *Solon v. Kaplan, Begy & Von Ohlen, supra*, further illustrates the significance of having the right to participate in the governance of a law firm. In *Solon*, the power attendant to Solon's position as a general partner figured prominently in the court of appeals' decision that he constituted an "employer" under *Clackamas*. Similar to Respondent's by-laws in the present case, which require a three-fourths vote of all shareholder/directors, Solon's partnership agreement with his firm allowed for his involuntary termination only by a two-thirds vote of the general partners. Like Petitioner, Solon also exercised substantial control over whether to require additional capital contributions, make financial commitments, amend the partnership agreement, and dissolve the firm. Like Petitioner, Solon had the ability to vote on the admission of new partners. Also like Petitioner, in addition to his voting rights, Solon held an equity interest in the firm, shared in its profits, attended the partnership meetings, and had access to private financial information. And like Petitioner, each of these benefits distinguished him from the firm's special partners (who had no equity interest or voting rights) and associates, to whom Petitioner in this case wishes to compare herself. *Id.* at 633.

Solon's likeness to Petitioner in this case does not end there. Solon also argued that the powers

conferred on him by the partnership agreement were "illusory." The Seventh Circuit found no factual support for that contention, however, as the record also failed to support Solon's claim that, notwithstanding his status, he had no actual authority over the firm's affairs because in practice he was supervised closely by the other partners:

> Solon had substantial control over the firm . . . control that he had the right to exert by virtue of the partnership agreement. Plaintiff's assertion that he consulted with his fellow partners before making major decisions may demonstrate that he was passive, but it does not show that he was powerless. Nor does his contention that he was outvoted undermine the conclusion that he was an employer.

Solon, 398 F.3d at 634.

Other courts that have considered the issue are in agreement with this approach. For instance, the plaintiff in *Serapion v. Martinez,* 119 F.3d 982 (1st Cir. 1997) (affirming summary judgment in favor of defendant law firm because plaintiff, an equity partner in the firm, was not an "employee" under Title VII), like Petitioner, attempted to focus the Court's attention "on the ways in which she possessed less power than the four name partners." However, as the First Circuit astutely reasoned, Serapion's:

> constellation of complaints assumes that all partners except those equivalent in stature and authority to the most powerful partners of a law firm are employees for Title VII purposes. The assumption lacks any solid legal underpinning.

> A person with the requisite attributes of proprietary status is properly considered a proprietor, not an employee, regardless of the fact that others in the firm may wield more power. *** . . . focusing on the fact that her views sometimes did not prevail confuses participation with control. Insofar as the management prong of the test is concerned, the hallmarks of proprietary status are the right to participate in decisionmaking and the right to have a meaningful say in governance. Within the structure of any organization, certain individuals tend to dominate others, and the dominators' viewpoints will more often be adopted. This phenomenon often occurs among equals (Adams reportedly wrote to Jefferson on November 12, 1813, describing Dickinson as "primus inter pares, the bellwether, the leader of the aristocratical flock") and, in all events, the exercise of hegemony by one partner does not automatically dislodge others in the hierarchy from proprietary status. Elsewise, all the partners in a law firm or an accounting practice, save only the managing partner(s), would be treated as employees for Title VII purposes regardless of the extent of their ownership or the correlation between their remuneration and the entity's profits. The law is to the contrary: it is not a necessary corollary of proprietary status that the views of the partner in question will always – or even usually – prevail.

Serapion, 119 F.3d at 992. As the First Circuit further stated, "voting status in a law firm's highest decisionmaking body is no small thing. The fact that

the membership consisted of roughly half the lawyers in the firm dilutes, but does not dispel, the significance of such membership." *Id.* at 991.

Likewise, in *Cronkhite*, the district court found that the fourth *Clackamas* factor supported the conclusion that Dr. Cronkhite was not an employee of Unity. In that case, Dr. Cronkhite argued that his ability to influence Unity was limited, at best, because Unity's management structure was "centralized" due to the amount of control and influence Dr. Bishop, Unity's president and CEO, had over the company. The court found that the fact that Dr. Bishop may have exercised significant influence over the organization "does not negate the fact that Dr. Cronkhite influenced Unity as well." *Cronkhite*, 2007 U.S. Dist. LEXIS 24884, at *29. The court went on to explain that:

> This *Clackamas* factor does not require that all of those with influence had equal potential to control the organization; rather, we are to consider "whether, and if so, to what extent" an individual wielded influence. Clearly, Dr. Cronkhite exercised great control over the organization as a member of its Board from 1982 through 1996. *** Moreover, the fact that Dr. Cronkhite was not ultimately successful in some attempts to exert influence over Unity – specifically, his unsuccessful bid for a Board position in 2003 – does not demonstrate that he lacked influence.

Id.

In short, *Solon*, *Schmidt*, *Serapion* and *Cronkhite* confirm that the source of an individual's authority is

critical in determining whether he is appropriately classified as an employer or employee. In each of these cases, the plaintiff occupied a position (partner or shareholder/director) which by right gave him a vote in the affairs of the organization. That right did not necessarily enable the plaintiff to impose his own will on the organization: in *Solon*, the plaintiff had been removed from the partnership, and in *Schmidt*, an unfavorable compensation plan had been adopted over the plaintiff's objection. But in each case the plaintiff's status entitled him to a say in the fundamental decisions of the business that other workers, *e.g.*, associates, special partners, and non-shareholders, did not enjoy.

The same is true in the present case. Throughout her relationship with Respondent, Petitioner has had ample opportunity to share, and has shared, in the management and control of her law firm. The record is replete with examples of these opportunities. She has had the right and the ability to impose her will on Respondent through management service on various committees and through shareholder votes, in which she has not hesitated to take positions adverse to the position of the executive committee and her other fellow class A shareholder/directors. In light of the legal standards set forth above, to which Petitioner offers no contradictory authority, and given the undisputed facts of this case, it is clear that the lower courts correctly determined that the fourth *Clackamas* factor weighs in favor of a determination that Petitioner is not an "employee" of Respondent.

F. On The Fifth *Clackamas* Factor, The Courts Below Properly Determined That The Totality Of All Documents And The Conduct Of The Parties Demonstrate An Intent That Class A Shareholder/Directors Are Owners, Not Employees

The fifth factor articulated by this Court in *Clackamas* to determine whether a shareholder in a professional corporation is an "employee" or an "employer" for purposes of the anti-discrimination laws is "whether the parties intended that the individual be an employee, as expressed in a written agreement." *Clackamas*, 538 U.S. at 450. In *Clackamas*, this Court directed that a person's title and labels on documents are not determinative of whether the person is an employee under anti-discrimination laws and that there is no "shorthand formula or magic phrase" that is determinative of that issue. *Clackamas*, 538 U.S. at 449-50.

In this case, Respondent's by-laws clearly reflect the intent that shareholder/directors are owners of the professional corporation and as such are employers, not employees, of the firm. The by-laws govern equity interests in Respondent, the rights and duties to participate in management, exposure to liability, participation in profits and losses, capital investment in the firm, voting rights, calculations of distributions, and the security inherent in the fact that a shareholder/director can only be expelled through a three-fourths vote of his or her fellow class A shareholder/directors. Also, pursuant to section 3.08(g) of the by-laws, Petitioner, like all other class A shareholder/directors, receives a package of benefits

that associate attorneys and other employees do not receive. Since becoming a class A shareholder/director, Petitioner has availed herself of these rights and benefits. Clearly, the totality of such documents, as well as Petitioner's exercise of her rights and obligations pursuant to them, attests to the intent of both her and Respondent that class A shareholder/directors are owners of the firm and not merely employed by it. Thus, the lower courts rightly determined that the fifth *Clackamas* factor weighs in favor of a determination that Petitioner is not an "employee" of Respondent.

G. On The Sixth *Clackamas* Factor, The Courts Below Properly Determined That Petitioner Shares In The Profits, Losses, And Liabilities Of Respondent

The sixth *Clackamas* factor asks "(1) whether the individual shares in the profits, losses, and liabilities of the organization." *Clackamas*, 538 U.S. at 450. Here, Petitioner maintains that she did not share in Respondent's profits in any meaningful way. Evaluation of the undisputed facts of record, as summarized above, confirms that Petitioner's unsupported contentions in this regard are, at best, disingenuous.

As with each of the preceding *Clackamas* factors, applicable case law interpreting the sixth criterion supports the conclusion that Petitioner is an employer rather than an employee. Under comparable facts, in *Cronkhite*, *supra*, the district court found that the sixth *Clackamas* factor supported the conclusion that Dr. Cronkhite was not an employee of Unity. In that

case, although it was undisputed that Dr. Cronkhite shared in Unity's profits through his receipt of discretionary bonuses as a Unity shareholder, Dr. Cronkhite attempted to discount that fact by arguing that Unity's board of directors is solely responsible for the distribution of bonuses. The court stated that it "fail[ed] to see the relevance of this argument, noting that the Board's discretion does not change the fact that Dr. Cronkhite did in fact share in the company's profits nearly every year . . .." *Cronkhite*, 2007 U.S. Dist. LEXIS 24884, at *32 n.10; *see also Solon*, 398 F.3d at 631, 633 (relying in part on the fact that Solon shared in the law firm's profits in determining that he was not the firm's employee); *Schmidt v. Ottawa Med. Ctr., P.C.*, 322 F.3d 461, 462-63 (7th Cir. 2003) (affirming summary judgment in favor of defendant medical center because Schmidt could not establish that he was an "employee" under the ADEA, reasoning that "each shareholder-physician is also eligible to share in OMC's profits via shareholder compensation"). Likewise, the fact that the executive committee is responsible for annually setting each shareholder's percentage interest in the firm, by explicit delegation from the board through the by-laws, does not change the undisputed fact that Petitioner's annual compensation did, in fact, fluctuate with the rise and fall of Respondent's profits every year.

In light of the legal standards set forth above, to which Petitioner offers no contradictory authority, and given the undisputed facts of this case, it is clear that the lower courts correctly determined that the sixth *Clackamas* factor weighs heavily in favor of a determination that Petitioner is not an "employee" of Respondent.

CONCLUSION

The petition in this matter does not meet any of the criteria set forth in the Rules of this Court for granting a writ of certiorari. Petitioner has not presented any compelling reasons for this Court to deviate from its Rules and grant a writ of certiorari. In addition, the district court and court of appeals correctly concluded, as a matter of law based upon undisputed material facts, that Petitioner is an employer within the meaning of the anti-discrimination laws who cannot assert claims under those statutes. Accordingly, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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